[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND CITIZENS OF PERTH . . . } APPELLANTS;
DEFENDANTS,

AND

HALLE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 19, 20, 24.

Griffith C.J., Barton and O'Connor JJ.

Right to the flow of subterranean water—Removal of sand and water—Subsidence—Statutory authority—Nuisance—Municipalities Act 1906 (*W.A.*), (*No.* 32 *of* 1906), *secs.* 221, 235.

In February 1899 the appellants, the Municipality of Perth, acting under statutory authority, put down a stormwater drain in a public street. Some years after the completion of the drain the respondent erected two houses which fronted the street in which the drain was laid, one house being built in 1904 and the other in 1905. Shortly afterwards the walls of both houses began to crack—one in 1906 and the other in 1907. The drain was badly constructed, large quantities of sand and water, carried away from the adjoining land, finding their way into it.

Held, affirming the judgment of *McMillan* J., that the appellants were liable for the loss of support caused by the removal of sand, and that the legal consequences would have been the same if the damage had resulted merely from the withdrawal of water, the appellants not being owners of the soil of the street so as to bring themselves within the doctrine of *Chasemore* v. *Richards*, 7 H.L.C., 349, and *Popplewell* v. *Hodkinson*, L.R. 4 Ex., 248, and having exceeded the authority of the Statute from which they derived their powers.

Per Griffith C.J.—The rights of the appellants with respect to the land in the streets of Perth are only such as are authorized by the Statute; and if and so far as they exceed their authority they are in no better position than a mere wrongdoer creating a public nuisance in the street.

Judgment of the Supreme Court varied and affirmed as varied.

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APPEAL from a judgment of *McMillan* J. sitting without a jury.

Halle brought an action against the Perth City Council for the negligent construction and maintenance of a drain in Royal Street, Perth, alleging that large quantities of water and sand had thereby been carried away, causing a subsidence in the surrounding soil and damaging his houses. *McMillan* J. found in favour of Halle both on the facts and the law, leaving the damages, by agreement of both parties, to be assessed by a jury.

From this decision the defendants now appealed to the High Court.

Pilkington K.C. (with him *Robinson*), for the appellants. The respondent's theory was that, as the water came in from the holes in the drain, sand followed it for a great distance on both sides of the drain from 50 to 100 yards, causing a subsidence of the street. The respondent attempted to prove the subsidence by taking levels. As a matter of fact it was not subsidence but wear and tear that caused the differences in the levels. *McMillan* J. did not give sufficient weight to the evidence given to rebut the respondent's theory. The cracks in the footpath, relied upon by the respondent, were not due to subsidence at all. The evidence establishes beyond doubt that the cracks were due to the marshy nature of the ground on which the houses were built. This imposed a duty on the owner to put in a foundation suitable for the class of house he built or the class of land on which he erected them: *Popplewell* v. *Hodkinson* (1). On the evidence the foundations were not suited to the peculiar nature of the surrounding soil. Further, the apertures in the drain were not large enough to have let in the large amount of sand which the respondent claimed was let in. The Council are under no liability for the mere abstraction of water. They are in the same position as an owner of land sinking a well in his own land: *Municipalities Act* 1906, sec. 221; *Chasemore* v. *Richards* (2); *Popplewell* v. *Hodkinson* (1); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (3); *English* v. *Metropolitan Water Board* (4); *Mayor, &c. of Bradford* v. *Pickles* (5).

(1) L.R. 4 Ex., 248.
(2) 7 H.L.C., 349.
(3) (1899) 2 Ch., 217.
(4) (1907) 1 K.B., 588.
(5) (1895) A.C., 587.

[GRIFFITH C.J. referred to *Nelson* v. *Walker* (1).]

New River Co. v. *Johnson* (2); *R.* v. *Metropolitan Board of Works* (3); *Acton* v. *Blundell* (4).

Villeneuve Smith (with him *H. P. Downing*), for the respondent. As to the facts *McMillan* J. came to a correct conclusion. The appellants are liable for the mere abstraction of water. They have no property in the subsoil of the streets, which are vested in them, not as owners, but only to such an extent as is necessary for carrying out their duties and obligations under the Act. The Council are practically strangers operating in the streets and they are trespassers: *Municipalities Act* 1906, sec. 221; *Municipal District of Concord* v. *Coles* (5); *Stainton* v *Woolrych* (6); *Dickinson* v. *Grand Junction Canal Co.* (7); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (8); *Lord Abinger* v. *Ashton* (9).

Pilkington K.C. in reply, referred to *Municipalities Act* 1906, sec. 245; *New River Co.* v. *Johnson* (2); *Chasemore* v. *Richards* (10).

Cur. adv. vult.

The following judgments were read:—

October 24.

GRIFFITH C.J. In this action the respondent claims compensation from the appellants for injuries sustained by him through the negligent construction and maintenance of a drain in Royal Street in the City of Perth, by reason of which it is alleged that the subsoil under two houses of the respondent fronting Royal Street was withdrawn and the houses were damaged.

By arrangement between the parties it was agreed that the action, "so far as the defendants' liability was concerned," should be tried before a Judge without a jury, the assessment of damages, if any, being left to a jury.

By sec. 221 of the *Municipalities Act* 1906 (which is a re-enactment of earlier Acts) the absolute property in any land in

(1) 10 C.L.R., 560.
(2) 2 E. & E., 435.
(3) 3 B. & S., 710.
(4) 12 M. & W., 324.
(5) 3 C.L.R., 96
(6) 26 L.J. Ch., 300.
(7) 21 L.J. Ex., 241.
(8) (1899) 2 Ch., 217.
(9) L.R. 17 Eq., 358.
(10) 7 H.L.C., 349.

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the municipal district which has been dedicated as a road, street or highway is vested in the municipality. The appellants are authorized by the same Act (sec. 235) to construct drains under public places and streets "for carrying off the water mud or refuse."

The drain in question, which is a brick barrel drain about eight feet six inches in diameter, was designed for carrying off surface and storm water, and the bottom of it at the locality in question is about twenty feet from the surface of the street. This locality was, in its state of nature, of a swampy or marshy character. The drain was completed in February 1899. It is not in controversy that it was badly constructed, or that in many parts of it, and in particular opposite the plaintiff's houses, there are large holes in the invert. The subsoil at this locality consists of sand extending to a depth of more than twenty feet. This sand, in a state of nature, was saturated with water, the water level being about eight feet from the surface. The effect of the holes in the drain was that large quantities of water came in from the subsoil, bringing with it sand. A further effect is that the water level in the subsoil has been reduced by about six feet. Soon after the completion of the drain the brick walls of many of the buildings fronting Royal Street began to crack, and there has since been a progressive deterioration in them. The plaintiff's houses, which are small brick cottages of one story, were erected after the completion of the drain, one in April 1904, the other in August 1905. The walls of one of them began to crack in October or November 1906, and of the other in May or June 1907. The plaintiff contends that the cracking was caused by the withdrawal of sand from below his land, or of sand from below the surface of the street to the benefit of which he was entitled for lateral support, or by both causes, or alternatively by the withdrawal of both sand and water. The defendants contend (1) that the damage to the houses was caused by faulty construction, particularly in the foundations; (2) that so far, if at all, as it is not attributable to faulty construction, it was caused by the withdrawal of water and not of sand, and that they are not liable for such withdrawal. It is common ground that they are liable for the consequences of withdrawal of sand due to the negligent construction or maintenance of the drain.

At the trial before *McMillan* J. a large body of evidence was given. That learned Judge found that the damage to the plaintiff's houses could not be accounted for by any defect in their construction, but was caused by the removal of sand. He was of opinion that if the damage had resulted merely from the withdrawal of water the legal consequences would have been the same. The formal judgment adjudged that the plaintiff "recover against the defendants such amount as shall be assessed by a jury to be due to the plaintiff", which, as I understand it, leaves the only question to be determined to be the amount of damage which has in fact been done to the houses, without any further inquiry into the cause of the damage.

I do not think it necessary to refer to the evidence at length. It is sufficient to say that there was abundant evidence to warrant the conclusion that considerable quantities of sand were carried into the drain through the holes in its bottom and walls. This process, going on for many years, must of necessity have withdrawn sand not only from the immediate vicinity of the holes themselves, but also from the surrounding soil; and it is obvious that if a brick building is resting upon a bed of sand, whether wet or dry, the withdrawal of an appreciable quantity of the subjacent sand will make the foundations settle, probably unequally, with consequent damage to the walls of the building.

It is equally obvious that the withdrawal of sand from the adjoining land will disturb the lateral support derived from it. The events which have followed have been just such as might be expected from the suggested cause. Not only have the walls of the plaintiff's buildings cracked to a serious extent, but the whole buildings have tilted forward towards the street, so that the foundations at the front are now three inches lower than at the back, without sinking into the soil. A natural inference is that the whole of the surface of the street over the drain has subsided bodily. Evidence was given that the actual level of the bottom of the formation of the street was not lower than when it was first put down, but there were other facts difficult to reconcile with this evidence.

There was a conflict of opinion among expert witnesses on the question whether the mere drying of the sand by the withdrawal

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of the water with which it was originally saturated would affect the stability of buildings standing upon it, but it would seem obvious that some effect must be produced by such a change of condition.

On the question of fact, therefore, I think that the decision of the learned Judge is unassailable.

The question principally debated before us was whether the appellants are liable for damage caused by the withdrawal of water as distinguished from the withdrawal of sand. They contend that the rule established by the case of *Chasemore* v. *Richards* (1) applies, that they are in the position of owners of the soil of the street, and that no one is entitled to complain of the abstraction by them of any subterranean water which may percolate into that soil, whether the abstraction is brought about by lawful or wrongful acts.

In *Chasemore* v. *Richards* (1) the defendant had by sinking a well in his own land abstracted percolating underground water that would otherwise have fed a stream to the benefit of which the plaintiff, the owner of adjoining land, was entitled.

In *Popplewell* v. *Hodkinson* (2) the defendant was the owner of the land in which he made the excavations that caused the abstraction of underground water from the plaintiff's land. It is contended that the basis of decision in both these cases was that there is no property in percolating underground water; and in *New River Co.* v. *Johnson* (3), language was used by some members of the Court which is consistent with that view. *Blackburn* J. however, said (4): "That the respondent would have had no cause of action against the appellants, had they been without statutory powers authorizing the acts which she complains of, is plain from the concluding words of the judgment of the Court of Exchequer Chamber in *Acton* v. *Blundell* (5), where it is laid down 'that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water col-

(1) 7 H.L.C., 349.
(2) L.R. 4 Ex., 248.
(3) 2 E. & E., 435.
(4) 2 E. & E., 435, at p. 446.
(5) 12 M. & W., 324.

lected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.'" The appellants in that case had statutory powers with respect to the land and were regarded as the owners of it.

That very learned Judge, therefore, thought that the right of an owner of land to exercise rights of ownership upon his own land was a material element in the question. In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company* (1), *Rigby* L.J. expressed the opinion that the rule depended upon the conjoint effect of the two doctrines indicated by the maxims *Cujus est solum ejus est usque ad inferos* and *Sic utere tuo ut alienum non lædas*. If the contention of the appellants is accepted to its full extent, it would follow that if a mere wrongdoer were to excavate in a road running along the boundary of arable land a ditch of such depth as to drain away all the water and make the land useless the owner would have no remedy. In such a case the wrongdoer would be committing a public nuisance causing special damage to the owner of the arable land, and in my opinion the rule relied upon would not protect him.

I think that the rights of the appellants with respect to the land in the streets of Perth, although the property in it is vested in them, are only such as are authorized by the Statute from which they derive their authority and power (see *Municipal Council of Sydney* v. *Young* (2)); and that, if and so far as they exceed their powers, they are in no better position than a mere wrongdoer creating a public nuisance in the street.

There is no doubt that even an authorized work constructed by a municipal authority may be a nuisance if it is negligently executed or maintained. In that case they are not, in my opinion, protected either by the Statute or by the rule laid down in *Chasemore* v. *Richards* (3).

Again, I do not think that the authority to construct drains given by sec. 235 empowers a Municipal Council to withdraw the subterranean water from the soil of their municipal district to any greater extent than is necessary for drainage, as that term is

(1) (1899) 2 Ch., 217.
(2) (1898) A.C., 457.
(3) 7 H.L.C., 349.

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commonly used. In the case of a swampy or marshy area, works for the drainage of the street would not be in excess of the authority merely because an incidental effect was to dry up the surface of the adjacent land. But the withdrawal complained of in the present case is withdrawal of water to a depth far below the level at which such works would cease to have any effect.

It is possible, indeed, that, even if the drain in question had been constructed and maintained without negligence, it would have had—as it has had in fact—the effect of drying the originally swampy surface to some extent, and that that drying has resulted in some damage. For any such damage I do not think that the defendants would be liable. A further reason for thinking that they would not be liable for it is afforded by the doctrine propounded by this Court in *Nelson* v. *Walker* (1), that on the sale of land by an owner (whether the Crown or a private person) it must be taken to have been in the contemplation of the parties that the vendor shall retain over the unsold land such rights as may be necessary in order that the unsold land may be put to the uses to which land of that character may, having regard to all the circumstances of the case, be reasonably expected to be put—a doctrine especially applicable to the acquisition and ownership of land in a state of nature in a newly settled country.

If, then, the drain had been constructed and maintained without negligence, and so as not to affect the plaintiff's land to any greater extent than that which I think permissible, the defendants would not, in my opinion, have been liable for any damage caused to the plaintiff's houses by reason of its construction (*East Fremantle Corporation* v. *Annois* (2)).

It follows that, in my judgment, the plaintiff is entitled to recover from the defendants compensation for all such damages as he has sustained by their negligence in the construction and maintenance of the drain, but not including any damages that he would have sustained if it had been constructed and maintained without negligence and in such a manner as not to affect the subjacent and circumjacent soil to any greater extent than was reasonably necessary for the effectual draining of the street. There may be some difficulty in distributing the total amount of

(1) 10 C.L.R., 560.

(2) (1902) A.C., 213.

damage and in apportioning the aggregate effect to the respective causes, but the difficulty of apportionment does not affect the rule.

For these reasons I think that the judgment appealed from should be affirmed, but with a variation limiting the amount of damage to the extent which I have indicated.

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BARTON J. There is ample evidence to shew that damage to the plaintiff was caused by the withdrawal of water and sand from under his houses, which thus lost part of their support. Before the construction of the drain the land was swampy, but the drain fulfilled its original purpose of carrying off surface and storm water. Unfortunately it did much more. Owing to admitted defects in its construction, large holes or disruptions occurred in its bottom and sides, and the appellants failed to repair them properly. Through these holes water, and sand with it, found their way in large quantities into the drain. Of course that which first got into the drain came from the soil immediately subjacent and adjacent to the street itself. But the effect of its withdrawal was to set in motion other sand and water which came to supply the place of that which had been withdrawn, and which, as it in turn passed towards and into the drain, was followed by other sand and water, drawn from under the neighbouring properties. In this way subsidence was caused, leading to settlement and cracks in the houses, two of which, the property of the plaintiff, the respondent, were in common with others seriously damaged. The drain was completed in February 1899. The two houses were built in 1904 and 1905 respectively. One of them began to crack in 1906, the other in 1907, and the damage was progressive until 1910, in which year the action was instituted.

It is not contested that the drain was constructed and maintained under legislative authority. See *Municipalities Act* 1906, sec. 235, and Act of 1895, sec. 109. That authority however extends only to the proper execution and maintenance of the work, and gives no sanction to negligent construction or maintenance, nor any immunity from the consequences of negligence.

The *Municipalities Act* 1906, sec. 221, is as follows:—"It

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is hereby declared and enacted that, notwithstanding any presumption of law to the contrary, the absolute property in any land in a municipal district heretofore or hereafter reserved, proclaimed, or dedicated under this or any other Act as a road, street, or highway is, and shall be, vested in the municipality."

That of itself, according to the case of *Municipal Council of Sydney* v. *Young* (1), "vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street; . . . it does not vest the soil or the land in them as the owners." But such rights in the soil or subsoil as may be necessary for the proper construction and maintenance of any work which a Statute authorizes, are conferred on the municipal authority by necessary implication when such a work is undertaken and after its completion controlled by them, as in the present case. If however they go beyond the bounds of their statutory powers they cannot make the limited rights vested in them their excuse for encroachments on the rights of others, when such encroachments are the excesses complained of, or their consequences.

The case cited, of *East Fremantle Corporation* v. *Annois* (2), cannot avail to justify any conduct of the appellants, actionable but for their Statutes, unless it is strictly warranted thereby. Inefficiency in the construction or maintenance of this drain was certainly not so warranted. If therefore, and so far as, it caused actionable damage to the respondent, he must recover to the extent of that damage, assessed hereafter by a jury.

Then was this damage, or any of it, actionable? The appellants say that none of it was caused by the withdrawal of sand, and that it was all caused by the drainage of water, which they further say they were entitled to withdraw, whether its abstraction were intentional or negligent. The water level in the soil indeed appears to have been considerably reduced. The respondent contends that the damage was caused by the withdrawal of sand below his land or sand affording it lateral support—or, if not entirely so caused, that it resulted from the withdrawal of sand and water together. And he maintains that in the circum-

(1) (1898) A.C., 457, at p. 459. (2) (1902) A.C., 213.

stances of this case he would have had an action against the appellants even had the damage resulted from the withdrawal of water alone. There he is supported by the opinion of *McMillan* J., who tried the case, and the formal judgment now appealed from accords with that opinion. The finding of the learned Judge, embodied in his reasons, is that large quantities of sand, sufficient to account for the damage, were withdrawn, as well as the water, but he made no distinction in his judgment between the one and the other, I take it because of the opinion to which reference has been made.

Many authorities were cited, but the appellants chiefly relied on the cases of *Chasemore* v. *Richards* (1); *Popplewell* v. *Hodkinson* (2), and *New River Co.* v. *Johnson* (3). Their contention went to the length of maintaining that, even apart from any statutory protection, they were entitled to withdraw the percolating water subjacent to the properties adjoining the street under which the drain was built. This contention was based on the further one that percolating underground water is not the subject of any proprietary right, and therefore that an owner cannot maintain any action against a stranger, who, even as a trespasser on adjoining land, withdraws the water to the damage of the owner's property. I do not think that the authorities support this proposition, though they do not expressly negative it. They deal with questions between neighbouring owners, and any such negation was unnecessary for the purpose in hand. The case of *Acton* v. *Blundell* (4), was between two owners, of whom one, the defendant, by sinking coal-pits in his own land, drew away the water which had previously collected underground in the well of the plaintiff, and so laid his well dry. The Exchequer Chamber held for the defendant, and *Tindal* C.J., delivering the judgment of the Court, rested the case on (5) "that principle, which gives to the owner of the soil all that lies beneath his surface." He laid down (5) "that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who

(1) 7 H.L.C., 349.
(2) L.R. 4 Ex., 248.
(3) 2 E. & E., 435.
(4) 12 M. & W., 324.
(5) 12 M. & W., 324, at p. 354.

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owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action." The learned Chief Justice had just pointed out that the Court was deciding the case upon principle, that (1) "no direct authority can be cited from our books," and that under such circumstances, if the conclusion of the Court proved to be supported by the Roman law, no small evidence of its soundness was afforded. He then quoted, as (1) "decisive upon the point in favour of the defendants," the Digest, lib. 39, tit. 3, sec. 12, "*Denique Marcellus scribit, Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi: nec de dolo actionem, et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.*" In English law the principle is not qualified even to the extent expressed in the Digest; the motive of the defendant is immaterial. See *Mayor &c. of Bradford* v. *Pickles* (2).

Acton v. *Blundell* (3), therefore, does not carry the immunity beyond the case where the defendant, in withdrawing subterranean water from the plaintiff's land, is exercising a strictly proprietary right to the full use of his own land.

I come to the case of *Chasemore* v. *Richards* (4), where the owner of land, on which he had a mill, supplied with water for over sixty years by a stream chiefly fed by percolating water, was held by the House of Lords to have no right of action against the officer of a local Board of Health, who for purposes sanctioned by their Statutes, had sunk, "on a piece of land of and belonging to them," an extensive well, from which they supplied water to a number of surrounding inhabitants, many of whom had no title as landowners to the use of the water, and so had diminished the supply of underground water to the stream and consequently to the plaintiff's mill. Lord *Chelmsford* in his speech drew attention to the fact that the acts complained of

(1) 12 M. & W., 324, at p. 353.
(2) (1895) A.C., 587.
(3) 12 M. & W., 324.
(4) 7 H.L.C., 349.

were done by the defendant upon his own land, and he quoted the passage above transcribed from the judgment in *Acton* v. *Blundell* (1), stating the principle upon which it rested. *Wightman* J., delivering the unanimous opinion of the Judges, with which the House of Lords agreed, had pithily stated (2) that in *Acton* v. *Blundell* (1) "the Court of Exchequer was of opinion that *the owner* of the surface might apply subterranean water as he pleased, and that any inconvenience to his neighbour from so doing was *damnum absque injuriâ*, and gave no ground of action." The principle of these cases, while it remains unshaken, (see *Mayor &c. of Bradford* v. *Pickles* (3)) does not, I think, extend to afford immunity to a stranger who draws off percolating water from under another person's land without the justification of any proprietary right.

The judgment of the Court of Exchequer, *per Cockburn* C.J. in *Popplewell* v. *Hodkinson* (4) was cited. He said:—"Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if, for any reason it becomes necessary or convenient for him to do so." The defendant there was the builder employed by the owner adjoining the plaintiff, and no doubt the case may be cited as exonerating an adjoining owner who drains his neighbour's land in the exercise of his right of property within his own land, because, as the judgment went on to say (5), "there was no obligation on him, or those who claim through him not to drain, to such an extent as the nature of the building to be erected rendered safe and desirable." That case, so far as it refers to the right to drain one's own land, even though the doing of it cause damage to a neighbouring owner, would have been in the appellants' favour if they had been merely exercising rights incident to their holding of land as property. But their contention as to a stranger's immunity, and their own consequent immunity if they are not in the position of adjoining owners, is not advanced by it.

The next of the appellants' authorities, and that on which they most relied for this part of their case, is *New River Com-*

(1) 12 M. & W., 324.
(2) 7 H.L.C., 349, at p. 367.
(3) (1895) A.C., 587.
(4) L.R. 4 Ex., 248, at p. 251.
(5) L.R. 4 Ex., 248. at p. 253.

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pany v. *Johnson* (1). There the New River Company, acting under statutory authority, had caused the plaintiff damage by making a drain or sewer which had deprived her of water she should have had from her well. The Statute took away the right of action and substituted a right to compensation, but the company contended that the landowner would, in the absence of the Statute, have had no right of action, and therefore she could not claim compensation. The claim was put in two ways, first, that the defendants had wrongfully cut off the underground supply of water to the well before it could reach the well, and, secondly, that they had wrongfully drained the plaintiff's well of water which had already percolated into it underground. The Court of Queen's Bench held, on the authority of *Chasemore* v. *Richards* (2) and *Acton* v. *Blundell* (3), that there had not been on either ground any right of action for such damage before the Statute, and consequently that there was no right to compensation since its passage. There can be no doubt that, if the appellants rightly interpret the judgments in that case, they can be adduced in support of the argument that, even apart from statutory authority and apart from ownership, they were entitled to do the things complained of, in the absence of negligence. The results of such a doctrine, if upheld, need not be enlarged on. But they would be rather alarming. For myself, I think, as I pointed out during argument, that the key to the decision is to be found in the passage already read by the Chief Justice from the judgment of *Blackburn* J., which supports the position of the New River Company by treating them as adjoining owners, and applying in their favour the words of the judgment of the Court in *Acton* v. *Blundell* (4) "that *the person who owns the surface* may dig therein, and apply all that is there found to his own purposes at his free will and pleasure" &c. That was abundant authority on which to base a decision in favour of such owners, and it is not likely that the other Judges intended by any observations of theirs to put the case any higher. I am of opinion, therefore, that the mere stranger fares no better under this decision than under any other, and that in the absence of authority to sustain the

(1) 2 E. & E., 435.
(2) 7 H.L.C., 349.
(3) 12 M. & W., 324.
(4) 12 M. & W., 324, at p. 354.

extreme proposition on which the appellants rely, such a person would be liable if he entered on a property or a street, and by excavation or otherwise, drained the percolating underground water so as to cause the settlement and injury of houses belonging to the owner of adjoining land.

It is to my mind clear that the appellants had no right to drain the subsoil of adjacent owners to the injury of their properties. The authority given them by sec. 235 of the Act of 1906, following sec. 109 of the Act of 1895, is to drain the streets which they are to control, and not to drain the subsoil of surrounding localities or districts. If the former cannot be drained without also draining the latter, well and good; they are protected to that extent. But, as I understand the case, it is not set up that all the withdrawal of support which occurred was inevitable. Nor is it, indeed it cannot be, seriously contended that, if the drain had been properly built and kept, the extensive damage complained of would still have been sustained. The withdrawal of water has occurred at a depth which would have been untouched had the work been sound. Although under proper construction there might have been a little subsidence by reason of the drying of the surface and the subjacent soil to some very slight depth, yet the bottom and sides of the invert would not have let in the water, or the sand and water, and the respondent would not have suffered the damage consequent on their doing so, and which we have here to deal with. I am of opinion then that the appellants, who admit the withdrawal of water, have failed to show that the damage was due to that cause only, and that even had they succeeded in doing so, they have not shown themselves, in respect of the damage from that single cause, to be in the position of adjoining owners so as to be able to justify it on that ground. In the absence of such justification I think they fail altogether. They admit that they are liable for damage caused by the withdrawal of supporting sand, if it occurred. The learned Judge who tried the case has found that it has occurred, and that with his other findings of fact must be sustained. In my judgment therefore the appellants are liable for the damage from both these causes, so far as their negligence has caused it. Under these circumstances the endeavour to dis-

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tinguish the case of *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (1), is immaterial, though I do not think it would have been distinguishable if the appellants had been exercising the rights of an adjoining owner, because there is no difference, on the question of the liability of such an owner, between the "running silt" withdrawn in that case, and the wet sand, or sand mixed with water, which was withdrawn through the appellants' conduct. I should mention moreover that in that case, *Lindley* M.R. did not give anything like whole-hearted adhesion to *Popplewell* v. *Hodkinson* (2) if treated as a general authority that in no case will an action lie against defendants who have (3) "done nothing more than pump water from *their own land* and thereby let down the plaintiff's houses," and that *Rigby* L.J., treated the solution of the class of cases to which *Popplewell* v. *Hodkinson* (2) belongs as depending upon some practical limitation of the maxim that the owner of the soil owns it to the utmost depths, by the other maxim that no man has a right to use his own property so as to injure the proprietary rights of another. "These doctrines," he said (4), "driven to their logical extreme, are irreconcilable." It is plain that both these distinguished Judges thought that the defence to an action for damage arising from the abstraction by drainage of percolating underground water must rest on the former of these maxims and the ownership of the soil on which the thing complained of has been done.

Through the negligence of the appellants they have not confined themselves to the exercise of the rights conferred on them by Statute, and they have not the defence which adjoining owners might set up. As, apart from either of these defences, they have none, they are liable for the whole of the excess over their rights which has caused this nuisance to the respondent. But it follows that in assessing the damage an elimination must be made of any which would necessarily have been entailed by the proper draining of Royal Street as authorized by Statute.

The only alteration which need be made in the formal judgment is one which will provide for this distinction, and subject to it I think the appeal should be dismissed.

(1) (1899) 2 Ch., 217.
(2) L.R. 4 Ex., 248.
(3) (1899) 2 Ch., 217, at p. 239.
(4) (1899) 2 Ch., 217, at p. 243.

O'CONNOR J. By agreement between the parties the learned Judge at the trial determined only the question of the defendants' liability on the facts established in evidence, leaving the matter of damages in respect of the liability so determined to be assessed later on by a jury. The plaintiff charged the defendants with having damaged his houses by withdrawing from under their foundations sand and other soil with water by means of a drain negligently constructed and maintained by them in a street adjoining. The defendants, besides denying the charge, alleged that the plaintiff's houses were injured, if at all, by the mere draining off of water from the land upon which they were built and contended that, even if the municipality had by means of the negligently constructed drain drawn off the water and so let down the foundations of the houses, no action would lie against them at the suit of the plaintiff for that injury. The learned Judge was therefore called upon to decide, and did decide, the two questions thus raised. He held that the drain had been negligently constructed and that the plaintiff's houses had been injured by the withdrawal of sand and water from under their foundations by means of holes in the invert of the negligently constructed drain, but he also held that, even if there had been no withdrawal of sand but a withdrawal of water only, the defendants would have been equally liable. This Court is therefore called upon, in the first place, to decide whether the learned Judge determined rightly that the injury to the plaintiff's houses was caused by the withdrawal of sand and water from under the foundations by means of the defendants' drain negligently constructed and whether the defendants were liable to the plaintiff for damages in respect of that injury. If the Court upholds the learned Judge's determination in that matter, it appears to me that the question whether the defendants are or are not liable for the withdrawal of water only cannot arise. If, however, the Court should come to the conclusion that the injury was caused in whole or in part by the withdrawal of water only, then it must also determine whether or not the defendants are liable to the plaintiff under the circumstances established in evidence for injuries caused by the withdrawal of water only. After having had the advantage of a careful examination of the evidence

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under the guidance of very able arguments from both sides, I have come to the conclusion that it is impossible on any principle properly applicable to the review of decisions of a Court of first instance on questions of fact to disturb the finding of the learned Judge in his determination as to the real cause of injury to the plaintiff's houses. It is quite clear that the holes in the invert of the drain arose from negligent construction and that through those holes large quantities of sand with water passed into the drain from the plaintiff's land adjoining. The learned Judge was, I think, justified in accepting the view of the plaintiff's expert witnesses that the passing of that sand and water into the drain had the effect of withdrawing adjoining sand to take its place and so gradually let down the support upon which the plaintiff's houses were built. Upon that state of facts there can be no question in law as to the defendants' liability, and, if it were admitted that the damage had arisen exclusively from that cause, it would be unnecessary for this Court to do more than affirm the learned Judge's determination. But the defendants have raised a question as to the extent to which the withdrawal of water only, independently of any withdrawal of sand, has contributed to the damage of which the plaintiff complains. As that question may have to be considered by a jury in assessing damages later on, I think the Court should give expression to its views on that aspect of the case.

The *Municipalities Act* 1906 by sec. 221 expressly vests in the defendants the absolute property in the streets and roads of the municipality. If that provision had the effect of making the municipality absolute owners of their streets for all purposes, and of putting the defendants with respect to the street in question in the position of adjoining owners to the plaintiff, the cases relied upon by the defendants would apply. It might well be conceded that under those circumstances *Popplewell* v. *Hodkinson* (1), even as interpreted by the learned Judges in *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (2), would be a sufficient authority to relieve the defendants of liability. If the defendants were adjoining owners, in the sense in which that expression is used in those cases, and in *Chasemore* v.

(1) L.R. 4 Ex., 248.

(2) (1899) 2 Ch., 217.

Richards (1), and in *Acton* v. *Blundell* (2), they would be entitled in the ordinary exercise of the rights attaching to ownership to draw off water percolating, as in this case, through the soil of their own land in no defined channel. But that is not the position which a municipality occupy in relation to the streets and roads under their control. Their right of property in streets and roads, even when conferred in absolute terms, is a right of property only in so far as such right is necessary for carrying out their duties and obligations under the Act. In *Stainton* v. *Woolrych* (3) *Sir John Romilly* M.R. describes the relation to adjoining owners of a public body, charged with the execution of a public work, in the following passage :—"It is unnecessary to consider the effect of the decisions relating to the right of an adjoining proprietor by drainage or underground percolation to water which would have flowed, or is actually flowing in the soil of a neighbouring proprietor. They are decisions which do not belong to this case. Neither of the defendants can be considered as being clothed with the rights or obligations of the owners of the lands. In some respects, as regards adjoining proprietors, their rights are greater ; in some respects the obligations imposed on them are more onerous than those which attach to the owners of adjoining land. The rights and obligations, such as they are, are conferred, imposed and defined by Statute. Beyond the powers conferred upon them they can do nothing ; the defendants, therefore, cannot be considered as being in the situation of adjoining landholders ; but the Statutes alone under which they act must be considered for a solution of the question, interpreted and illustrated as such question may be, by the decided cases which relate to acts done under these or other Statutes conferring similar powers."

In this case the rights, obligations and powers conferred and defined by the Statute are clear beyond question. The municipality are authorized to drain their streets and roads of underwater, as well as of surface water, in so far as such drainage is necessary for securing their proper formation and maintenance. But that draining must be carried out by means of works

(1) 7 H.L.C., 349. (2) 12 M. & W., 324.
(3) 26 L.J. Ch., 300, at p. 303.

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properly constructed and maintained. If the works are negligently constructed or maintained the municipality are, with respect to the consequences of that negligence, entirely outside the authority and protection of the Statute. In so far as those consequences are concerned they are in no better position than strangers or trespassers. As *Sir John Romilly* says at the end of the passage I have quoted (1):—"If either of these boards were producing this injury by the unskilful or improper construction of this sewer, this Court would interfere to prevent it."

In this case the circumstances make it impossible to truthfully allege that it was necessary for any lawful municipal purpose to drain the subsoil water from the plaintiff's land adjoining the street. The drain was not constructed for that, but for quite another purpose, namely, the purpose of carrying off stormwater from other localities. It was never intended to drain the plaintiff's land—it drained the plaintiff's land only because it had been negligently constructed and maintained. Under these circumstances it is clear that, in so far as the drawing off of the underground water from the plaintiff's land is concerned, the drain is entirely outside the authority of the *Municipalities Act*, and the plaintiff is entitled to treat it as a work carried out in a public street adjoining his property whereby injury had been caused to the foundations of his houses, a work the carrying out of which was not authorized either by statutory authority or by virtue of the rights of private ownership. It is obvious that under these circumstances the municipality could not justify what they have done as the exercise of any legal right on their part. But Mr. *Pilkington*, in his argument for the appellants, contended that, even if the municipality had carried out their work in the street without any more justification than a mere trespasser would have had, still the plaintiff must fail, because he himself had no right to the support of the water underlying his land, and could have no cause of action against anyone for its withdrawal. It is, I think, clear that that contention cannot be upheld if one has regard to the principle upon which the right of a landowner to the use of underground water percolating through his land is based. In *Acton* v. *Blundell* (2) *Tindal* C.J., in a

(1) 26 L.J. Ch., 300, at p. 303. (2) 12 M. & W., 324, at p. 353.

passage in his judgment—since then approved and followed in *Chasemore* v. *Richards* (1) and many subsequent cases dealing with the subject—states what appears to be the true ground in these words. After referring to a question of user which had been raised in the course of the argument, he says:—". . . . . We think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock or porous ground, or venous earth or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description *damnum absque injuriâ*, which cannot become the ground of an action."

In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (2) *Rigby* L.J., in expounding the limitations of adjoining owners' rights, brings out the principle even more clearly. He says:—"There are two doctrines sufficiently indicated by the maxims *Cujus est solum ejus est usque ad inferos*, and *Sic utere tuo ut alienum non lædas*, which have to be considered. These doctrines, driven to their logical extreme, are irreconcilable. Some practical limitation of one by the other has to be arrived at. The first doctrine gives everything below the surface to the landowner; but it has been settled that by reason of the second doctrine he cannot take away his own minerals with the result of letting down his neighbour's surface, or ancient buildings on his neighbour's land, to the damage of that neighbour, without being liable, so long as he remains in possession of the chamber from which the minerals have been withdrawn, to an action by that neighbour. Here is one plain and important limitation of the landowner's right."

In each of the cases from which I have quoted the Court was considering to what extent the right of a landowner to possess

(1) 7 H.L.C., 349.

(2) (1899) 2 Ch., 217, at p. 243.

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and use everything on and under the surface of his land had to be modified by the existence of a right exactly similar in his neighbour over the land adjoining. In both cases the two maxims to which *Rigby* L.J. referred must be applied. The rights of a landowner to the use of everything on his own land "*usque ad inferos*" cannot be cut down except in so far as their exercise would interfere with the adjoining owner in the exercise of his rights. The landowner's right to the support of underground water, for instance, has to give way when the land of his neighbour adjoining cannot be fully used without draining it away. The proposition, therefore, that a landowner has no enforceable legal right to the support of subterranean waters under his land cannot be sustained. The true position of the landowner in my opinion is this:—He is entitled to have his land supported by the underground water which naturally underlies it. That right is one of the incidents arising out of his ownership, and, unless it is taken away by Statute, he can assert it against all the world except the adjoining owner. Even the latter is entitled to interfere with the full enjoyment of the right only when the lawful use of his own land necessarily involves that interference. But, as against every person other than the adjoining landowner, he has the same remedy for the protection of this, as he has for the protection of any other, right arising out of his ownership. The municipality in this case had not, as I have pointed out, either the rights of a private owner or the authority of a Statute to justify what they have done. Their position was and is no other than that of any public body which, having charge of a public street, has by negligent, and therefore unauthorized, work in the street injuriously affected the right of an adjoining owner to his special damage. The construction and maintenance of the drain under these circumstances is a nuisance, actionable at the suit of a party injured. (See the observations of *Mellor* J. in *R.* v. *Metropolitan Board of Works* (1) and the judgment of Lord *Alverstone* C.J. in *English* v. *Metropolitan Water Board* (2). I can see nothing in the Municipalities Acts which relieves them from liability to the plaintiff for the special injuries he has suffered from the nuisance which their

(1) 3 B. & S., 710, at p. 728.

(2) (1907) 1 K.B., 588, at pp. 599, 600.

wrongful and negligent construction and maintenance of the drain have occasioned. I have therefore come to the conclusion that Mr. Justice *McMillan* was right in holding that, upon the facts found by him in this case, the municipality were liable to the plaintiff, not only for injury caused to his buildings by the withdrawal of sand with water from under his land, but also for the withdrawal of water support only, if it should turn out on further inquiry that any damage is fairly referable to that cause. I have dealt with the case on the basis of the facts as found by Mr. Justice *McMillan*, that is, that all the damage complained of arose from the negligent construction and maintenance of the drain, but I agree that the municipality are not liable for damage which would have equally arisen if the drain had been constructed and maintained without negligence. For these reasons I am of opinion that Mr. Justice *McMillan's* judgment was right both as to facts and as to law. I agree however that for the purposes of assessing damages the form of the order should be varied as suggested by my brother the Chief Justice.

Judgment appealed from affirmed with a variation by substituting for the words "upon the finding of the said Judge" the words "for all such damages as he has sustained by reason of their negligence in the construction and maintenance of the drain in the pleadings mentioned, but not including any damages that he would have sustained if it had been constructed and maintained without negligence and in such manner as not to affect the subjacent and circumjacent soil to any greater extent than was reasonably necessary for the effectual draining of the street." Appellants to pay costs of appeal.

Solicitors, for the appellants, *Northmore & Hale.*
Solicitors, for the respondent, *Smith & Lavan.*

J. H.